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QUESTIONING THE RIGHTS OF JUVENILE PRISONERS DURING INTERROGATION

ADAM MIZOCK¹

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I. INTRODUCTION

In the usual custodial interrogation scenario, police officers are required to give suspects the familiar warnings that the U.S. Supreme Court first enunciated in the 1966 case of *Miranda v. Arizona*.² This requirement narrows, however, when the suspect is a prisoner.³ Since prisoners are by definition in government custody, a majority of state and federal courts have required more than government custody to trigger *Miranda*'s safeguards in prison. A majority of those courts applies a totality-of-the-circumstances analysis, drawing on four factors to determine whether the prisoner was subjected to an additional restraint beyond normal prison conditions.

Part I of this Note will review a recent Colorado case involving the interrogation of a juvenile prisoner and the application of the additional-restraint factors within a totality-of-the-circumstances analysis. Part II will analyze how the decision in the Colorado case and the additional-restraint factors comport with the meaning of "custody" as set forth in U.S. courts' jurisprudence on custodial interrogations. Part III will propose that juvenile prisoners should be presumed in custody for *Miranda* purposes absent exceptional circumstances. It then will present the justification for this presumption, including a discussion of the solicitude normally provided to juveniles in the criminal justice system. Part III also explores the problems with the additional-restraint factors and the totality-of-the-circumstances analysis. This essay concludes that juvenile prisoners should be found to be in custody for *Miranda* purposes, unless certain exceptional circumstances are present.

II. THE PROBLEM: *PEOPLE EX REL. J.D.*

In its 1999 opinion in *People ex rel. J.D.*, the Colorado Supreme Court considered how to determine when a questioned juvenile prisoner is in custody such that officers must give *Miranda* warnings before interrogating the juvenile.⁴ In *J.D.*, the juvenile defendant moved to suppress statements she made to state officers while in jail.⁵ The Morgan County District Court granted her motion, and the District Attorney took an interlocutory appeal.⁶ In reversing, the Colorado Supreme Court held that whether a juvenile prisoner is in custody for *Miranda* purposes is determined by an analysis of the totality of the circumstances.⁷

²Those warnings are:

Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.

Miranda v. Arizona, 384 U.S. 436, 444 (1966).

³For the purposes of this note, a prisoner is a juvenile or adult who has been convicted of a crime and is incarcerated in a detention facility, jail or prison. In general, juveniles are held in a juvenile detention facility rather than in a prison with adults.

⁴989 P.2d 762 (Colo. 1999).

⁵*Id.* at 765.

⁶*Id.*

⁷*Id.* at 771.

A. The Facts: J.D.'s Conversation with Police

J.D., a 16-year-old juvenile, had been detained in Colorado by Fort Morgan police for violating her Nevada probation.⁸ At that initial detention, Detective Keith Kurelich asked J.D. if she would answer questions regarding an armed robbery in Colorado.⁹ She refused. In response, Kurelich gave her his name and telephone number in case she changed her mind and wanted to speak with him later. The police then transported J.D. to a state juvenile detention center in Stateline, Nevada.¹⁰

On the next day, J.D. called Kurelich from the Nevada detention facility and left a message for him to return her call. The next morning, Kurelich returned J.D.'s telephone call and spoke directly to her. During the course of this conversation, J.D. told Kurelich that she wanted to talk with him about the armed robbery. In response, Kurelich told J.D. that he would call again later and asked her to make arrangements for someone she trusted to be present during their conversation.¹¹

After his conversation with J.D., Kurelich contacted J.D.'s mother. Kurelich orally provided *Miranda* warnings to the mother and told her about J.D.'s telephone call to him.¹² J.D.'s mother told Kurelich that she knew J.D. wanted to talk to him and that she approved of such a conversation.¹³

Later that same day, Kurelich again called J.D. Another detective, Nick Gardner, joined Kurelich and listened through a speakerphone.¹⁴ Steve Hagen, J.D.'s Nevada probation officer, and June Foster, a detention officer at the facility, were in the room with J.D. during the conference call.¹⁵

The conversation lasted approximately forty minutes. At the outset, Kurelich offered to do what he could to dismiss other charges against J.D. for "resisting arrest, obstructing and criminal mischief."¹⁶ Regarding the armed robbery, the trial court found Kurelich "assured" J.D. that under Colorado law she could be charged as an adult, but that if she cooperated, "there would be minimal or no charges brought"; that is, she would be charged as a juvenile.¹⁷ The trial court found that there "was active encouragement directed by words toward [her] to cooperate and to give a full statement" and that the probation officer in the room was "actively encouraging her to make a statement as he felt it would be in her interest to do that."¹⁸ J.D. then agreed to proceed, asking Kurelich, "Well do you want to know what happened, or

⁸*Id.* at 765-66.

⁹*J.D.*, 989 P.2d at 765.

¹⁰*Id.* at 767.

¹¹*Id.* at 765.

¹²*Id.* at 766.

¹³*Id.*

¹⁴*J.D.*, 989 P.2d at 766.

¹⁵*Id.* at 771.

¹⁶*Id.* at 766. J.D. had been detained by the Fort Morgan police for an unrelated incident at a local motel.

¹⁷*Id.*

¹⁸*Id.*

not?"¹⁹ J.D. then discussed details of the armed robbery, including the identities of participants and the weapon used.²⁰ At the end of the speakerphone conversation, Kurelich told J.D. that her mother had approved the interview earlier in the day.²¹ Kurelich did not give *Miranda* warnings to J.D. at any time during the telephone conversation. At no time did J.D. ask to end the call.²²

B. Colorado Law

1. Totality-of-the-Circumstances Analysis

By the time *J.D.* was decided, the Colorado Supreme Court had held in *People v. Denison*²³ that to determine whether a prisoner is in custody for *Miranda* purposes, courts must conduct a totality-of-the-circumstances analysis, using four additional-restraint factors.²⁴ The four factors are: the language used to summon the prisoner; the physical surroundings of the interrogation; the extent to which the prisoner is confronted with evidence of his or her guilt; and, the additional pressure exerted to detain the prisoner.²⁵

2. Statutory Safeguards

A Colorado statute forbids the admission of incriminating statements made by juveniles during a custodial interrogation unless a parent, guardian, or legal or physical custodian of the juvenile was present and both were advised of the juvenile's *Miranda* rights.²⁶ Thus, the statute provides juveniles with a level of protection beyond *Miranda*. The statutory protection is not triggered, however,

¹⁹*J.D.*, 989 P.2d at 766.

²⁰*Id.*

²¹*Id.*

²²*Id.*

²³918 P.2d 1114 (Colo. 1996).

²⁴*Id.* at 1116.

²⁵*Id.*

²⁶The statute provides:

No statements or admissions of a juvenile made as a result of a custodial interrogation ... shall be admissible in evidence against such juvenile unless a parent, guardian, or legal or physical custodian of the juvenile was present at such interrogation and the juvenile and his or her parent, guardian, or legal or physical custodian were advised of the juvenile's right to remain silent and that any statements made may be used against him or her in a court of law, of his or her right to the presence of an attorney during such interrogation, and of his or her right to have counsel appointed if he or she so requests at the time of the interrogation.

6 COLO. REV. STAT. § 19-2-511(1) (1999).

unless there is a custodial interrogation.²⁷ The public policy behind the statute is that juveniles may not fully understand their Fifth Amendment rights.²⁸

C. The Judgment of the Colorado Supreme Court

In *J.D.*, the Colorado Supreme Court held that under the totality of the circumstances, a telephone conference call between two detectives and a jailed juvenile, in the presence of a detention officer and a probation officer, was not a custodial interrogation.²⁹ Thus, though the juvenile was not given *Miranda* warnings, the juvenile's incriminating statements during the questioning were admissible against her in delinquency proceedings.

1. Majority Opinion

The majority opinion in *J.D.*, which four justices joined, extended *Denison* to juveniles.³⁰ Thus, it held that to determine whether a juvenile prisoner is in custody for *Miranda* purposes, courts must consider the totality of the circumstances, beginning with the four additional-restraint factors identified in *Denison*: (1) the language used to summon the prisoner; (2) the physical surroundings of the interrogation; (3) the extent to which the prisoner is confronted with evidence of his or her guilt; and (4) the additional pressure exerted to detain the prisoner.³¹

The majority further listed ten other factors that could be considered in the totality-of-the-circumstances analysis: time, place and purpose of the encounter; persons present during the interrogation; words spoken by officer to defendant; officer's tone of voice and general demeanor; length and mood of interrogation; any limitation of movement or other form of restraint placed on defendant during interrogation; officer's response to any questions asked by defendant; whether directions were given to defendant during interrogation; defendant's verbal or nonverbal response; and, presence of parents or whether parents had knowledge of the interrogation.³²

Despite its listing of these additional factors, the majority opinion focused on the four additional-restraint factors set out earlier in *Denison*.³³ Regarding the language used to summon J.D., the court stated that J.D. had not been summoned; rather, she voluntarily had initiated the communication.³⁴ The court then concluded that J.D. had experienced no adverse change in her physical surroundings.³⁵ It stated that J.D.

²⁷*Id.*

²⁸*See* *People v. Raibon*, 843 P.2d 46, 50 (Colo. Ct. App. 1992) (stating that the statute's "legislative purpose is to provide to the minor an opportunity to consult with a parent or guardian before deciding whether to assert or to waive his or her Fifth Amendment rights").

²⁹*J.D.*, 989 P.2d at 767.

³⁰*Id.*

³¹*Id.* at 768.

³²*Id.*

³³*Id.*

³⁴*J.D.*, 989 P.2d at 771.

³⁵*Id.*

had not been subjected to face-to-face questioning by the detectives.³⁶ Further, the probation officer and the detention officer, whom she trusted, had been present.³⁷ Reviewing the third factor, the majority stated that J.D. had been confronted with evidence of her guilt, including pictures that appeared to show her involvement in the robbery.³⁸ Reviewing the fourth factor, the court concluded that there was no evidence of any additional pressure exerted to detain J.D.³⁹ The court then held that J.D. had not been “in custody.”⁴⁰ Since J.D. had not been in custody, *Miranda* warnings were not required. Further, the extra statutory protection provided to juveniles during custodial interrogations did not apply, and the presence of a parent, guardian, or custodian was not obligatory.⁴¹ J.D.’s statements thus were admissible against her.

2. Dissenting Opinion

The dissenting opinion, joined by three justices, also considered the totality of the circumstances in light of the additional-restraint factors.⁴² The dissent accepted the trial court’s findings and concluded that the trial court correctly had applied the additional-restraint factors.⁴³

Regarding the first factor, the language used to summon the individual, the trial court had found nothing significant in the way the officers summoned J.D.⁴⁴ Regarding the second factor, the physical surroundings of the investigation, the trial court had found that the room was separate from the general population at the detention center and two officers were present during the entire interrogation.⁴⁵ Applying the third factor, the extent to which J.D. was confronted with evidence of her guilt, the trial court had found that Kuretich explained to J.D. that evidence incriminating her was available.⁴⁶ Addressing the fourth factor, the additional

³⁶*Id.*

³⁷The majority presumed that J.D. had arranged for these two adults to be present based on Kuretich’s suggestion.

³⁸*J.D.*, 989 P.2d at 768. The Colorado Supreme Court majority opinion did not specify how or when photographs were shown or mentioned to J.D. The dissenting opinion stated that Detective Kuretich had shown J.D. photographs from the robbery when Kuretich met J.D. in person while she was detained in Fort Morgan. *Id.* at 773. The prosecutor informed the author that Kuretich had reminded J.D. of the existence of the photos during the subsequent telephone conference call that is at issue in the case. Telephone Interview with Christian J. Schulte, Deputy District Attorney, Fort Morgan, Colo. (Mar. 30, 2000) [hereinafter Schulte interview].

³⁹*J.D.*, 989 P.2d at 772.

⁴⁰*Id.*

⁴¹*Id.* at 773.

⁴²*Id.* at 775 (Martinez, J., dissenting).

⁴³*Id.* at 775-76.

⁴⁴*J.D.*, 989 P.2d at 776.

⁴⁵*Id.*

⁴⁶*Id.*

pressure exerted to detain J.D., the trial court had found the use of coaxing and implied threats that unless J.D. cooperated, full charges would be brought against her.⁴⁷ The dissent stated that there was “ample evidence to support the trial court’s finding” that additional pressure was exerted to detain J.D.⁴⁸ In conclusion, the dissent believed that under the deferential, clearly erroneous standard of review, the trial court’s findings should not be disturbed.⁴⁹

III. LEGAL PRINCIPLES

A. *Miranda*: General Custodial Interrogation Principles

To evaluate *J.D.*, it is necessary to review the development of the custodial interrogation doctrine that originated with the U.S. Supreme Court’s decision in *Miranda*.⁵⁰ The U.S. Supreme Court has imposed bright-line procedural safeguards to protect individuals during custodial interrogations. The familiar *Miranda* warnings must be given to an individual who is subject to a custodial interrogation.⁵¹ The Court defined custody as when “a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”⁵² In a subsequent opinion, the Court held that the interrogation aspect is satisfied by “any words or actions on the part of the police ... that the police should know are reasonably likely to elicit an incriminating response from the suspect.”⁵³ The Court has carved three exceptions to the bright-line rule requiring *Miranda* warnings prior to all custodial interrogations: questioning conducted under exigent circumstances, questioning of unrestrained persons at the crime scene, or questioning by an undercover agent.⁵⁴

B. Determining “Custody” in Prison Interrogations

1. U.S. Supreme Court Precedents

Miranda had involved stationhouse questioning. There, the Court did not need to address the peculiar situation of interrogation inside a prison. A prisoner is by definition in government custody, but is it “custody” for purposes of *Miranda* as well? The movement of a prisoner is always restrained, and the prisoner clearly is not free to leave.⁵⁵ By this reasoning, all interrogations of prisoners by state actors

⁴⁷*Id.*

⁴⁸*Id.*

⁴⁹*J.D.*, 989 P.2d 777.

⁵⁰384 U.S. 436 (1966).

⁵¹*See Miranda*, 384 U.S. at 444.

⁵²*Id.*

⁵³*Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

⁵⁴*See Miranda*, 384 U.S. at 477 (*Miranda* warnings not required prior to on-the-scene questioning of unrestrained persons); *New York v. Quarles*, 467 U.S. 649, 655 (1984) (*Miranda* warnings not required when public safety at risk); *Illinois v. Perkins*, 496 U.S. 292, 300 (1990) (*Miranda* warnings not required when undercover officer questioned prisoner).

⁵⁵As Laurie Magid, Associate Professor at Widener Law School, has written:

would require *Miranda* warnings. The Court has confronted the issue of custody of prisoners on several occasions.⁵⁶

In its 1968 opinion in *Mathis v. United States*, the Court extended *Miranda* to the prison setting.⁵⁷ In *Mathis*, a state prisoner had been interviewed by an Internal Revenue Service agent about possible tax violations.⁵⁸ The prisoner was aware that the agent was a government official investigating the possibility of noncompliance with the tax laws.⁵⁹ Under the significant-deprivation-of-freedom-of-movement test, a prisoner may fall within *Miranda*'s definition of custody.⁶⁰ Specifically, the Court held that *Miranda* warnings were required when an individual is in prison for an offense unrelated to the interrogation.⁶¹ The agent did not give *Miranda* warnings before questioning the prisoner; consequently, the Court held that the prisoner's incriminating statements were not admissible at his subsequent trial on tax fraud charges.⁶² In *Mathis*, the Court did not question whether the prisoner was in custody, and expressly refused to narrow the scope of *Miranda*'s "clear and unequivocal language."⁶³ It thus might appear that custody in prison was simply custody for *Miranda* purposes. However, in dissent, Justice White stated that *Miranda*

rested not on the mere fact of physical restriction but on a conclusion that coercion – pressure to answer questions – usually flows from a certain type of custody, police station interrogation of someone charged with or suspected of a crime. Although petitioner was confined, he was at the time of interrogation in familiar surroundings.⁶⁴

In its opinion in *Illinois v. Perkins*,⁶⁵ the Court had an opportunity to address the question of whether prisoners are per se in custody for purposes of *Miranda*.⁶⁶ In

The traditional test for determining if a person was in custody when questioned focuses on whether there was a restraint on the defendant's freedom of movement of the degree associated with formal arrest and that would have made a reasonable person feel he was not free to leave.

Laurie Magid, *Questioning the Question-Proof Inmate: Defining Miranda Custody for Incarcerated Suspects*, 58 OHIO ST. L.J. 883, 939 (1997).

⁵⁶See *Mathis v. United States*, 391 U.S. 1, 4 (1968); *Illinois v. Perkins*, 496 U.S. 292; *Bradley v. Ohio*, 497 U.S. 1011 (Marshall, J., dissenting from denial of cert.).

⁵⁷*Mathis*, 391 U.S. at 4-5.

⁵⁸*Id.* at 4.

⁵⁹*Id.*

⁶⁰*Id.* at 5.

⁶¹*Id.* at 4-5.

⁶²*Mathis*, 391 U.S. at 4-5.

⁶³*Id.* The Court wrote: We find nothing in the *Miranda* opinion which calls for a curtailment of the warnings to be given persons under interrogation by officers based on the reason why the person is in custody. In speaking of 'custody' the language of the *Miranda* opinion is clear and unequivocal....

⁶⁴*Id.* at 7 (White, J., dissenting).

⁶⁵496 U.S. at 292.

Perkins, the prisoner had engaged in an incriminating conversation with an undercover agent whom the prisoner believed to be a friendly fellow prisoner.⁶⁷ The Court concluded that the prisoner was not in custody for purposes of *Miranda* because the “essential ingredients of a ‘police-dominated atmosphere’ and compulsion are not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate.”⁶⁸ The Court held that “*Miranda* warnings are not required when the [incarcerated] suspect is unaware that he is speaking to a law enforcement officer and gives a voluntary statement.”⁶⁹

Thus the Court held in *Perkins* that an undercover agent in prison need not give *Miranda* warnings before questioning a prisoner.⁷⁰ It is also important to note what the Court did not say. The Court did not clarify the more general question regarding what standard to apply to prison interrogations when the prisoner knows that the interrogators are government officers.⁷¹ Further, the Court declined to address whether the bare fact of being in jail constituted custody.⁷² The Court did not mention the additional-restraint factors, even though the circuit courts of appeals had been using them for several years.⁷³ Perhaps this is because the parties in *Perkins* did not discuss these factors.⁷⁴

Justice Marshall, in dissent, argued that incarceration constitutes custody as defined in *Miranda*.⁷⁵ Further, Justice Marshall argued that the psychological pressures unique to custody work to the state’s advantage such that the bare facts of custody and interrogation are enough to trigger the *Miranda* warnings requirement.⁷⁶ Justice Marshall’s argument, if accepted, would find custody per se for interrogations of prisoners in prison.

Subsequently, in the same year *Perkins* was decided, Justice Marshall, in dissent from a denial of a petition for certiorari in *Bradley v. Ohio*,⁷⁷ identified the question

⁶⁶*Id.* at 299-300.

⁶⁷*Id.* at 294.

⁶⁸*Id.* at 296.

⁶⁹*Id.* at 294.

⁷⁰*Perkins*, 496 U.S. at 300.

⁷¹*Id.*

⁷²*Id.* at 299. The Court stated: The bare fact of custody may not in every instance require a warning even when the suspect is aware that he is speaking to an official, but we do not have occasion to explore that issue here.

⁷³*See, e.g.,* *Cervantes v. Walker*, 589 F.2d 424 (9th Cir. 1978).

⁷⁴*See* 1988 U.S. Briefs 1972, Brief for Petitioner, Brief for Respondent, and Reply Brief for Petitioner, *Illinois v. Perkins*, 496 U.S. 292 (1990) (No. 88-1972).

⁷⁵*See Perkins*, 496 U.S. at 304 (Marshall, J., dissenting).

⁷⁶*See id.* at 307-08 (Marshall, J., dissenting). “Custody works to the State’s advantage in obtaining incriminating information. ...[T]he pressures unique to custody allow the police to use deceptive interrogation tactics to compel a suspect to make an incriminating statement.”

⁷⁷497 U.S. 1011 (1990).

left open by the Court in *Perkins*,⁷⁸ acknowledged the differing efforts of the lower courts to resolve it, and asserted that the Court needed to clarify what constitutes custody in a prison setting.

In *Bradley*, a group of prisoners was strip-searched immediately after a murder in the prison's sheet metal shop. After finding blood on a prisoner's clothing, the prison officials directly asked the prisoner several questions, including, "[D]id you do it?"⁷⁹ Justice Marshall stated that custody should have been found under *Miranda*, reasoning that the prisoner "was clearly in custody because he had been formally arrested."⁸⁰ Further, Justice Marshall concluded that an additional restraint, were it required, had been imposed on the prisoner because he was "detained in the sheet metal shop, targeted as a suspect in a serious crime, and forcibly strip searched."⁸¹ Justice Marshall argued that a coercive environment had been present on the ground that prison is "undoubtedly a 'police dominated atmosphere.'"⁸² Further, quoting from the majority opinion in *Perkins*, Justice Marshall stated: "Given the virtually complete control that prison officials exercise over prisoners' lives, petitioner surely felt compelled to answer questions 'by the fear of reprisal for remaining silent or in the hope of more lenient treatment should he confess.'"⁸³

C. Lower Court Opinions

During the time period between *Mathis* and *Bradley*, several appellate courts had dealt with this issue. The federal circuits and the state courts have refused to interpret *Miranda* and *Mathis* as imposing a per se rule that all prisoners are in custody. Some courts have argued that to do so would accord to prisoners a higher level of constitutional protection than free individuals enjoy.⁸⁴ Absent a per se rule of custody, different courts have reached opposite conclusions about prison custody

⁷⁸*Id.* at 1013 (Marshall, J., dissenting from denial of cert.) (quoting *Perkins*, 496 U.S. at 299) ("This Court recently left open the question whether '[t]he bare fact of custody [would] in every instance require a warning even when the suspect is aware that he is speaking to an official.'").

⁷⁹*Bradley*, 497 U.S. at 1013.

⁸⁰*Id.* at 1013.

⁸¹*Id.* at 1014.

⁸²*Id.* at 1015.

⁸³*Id.* at 1015 (Marshall, J., dissenting) (quoting *Perkins*, 496 U.S. at 297).

⁸⁴*See Cervantes*, 589 F.2d at 428 (stating that adoption of *per se* custody rule for prisoner would provide greater protection to prisoner than free individual).

However, a prisoner who is only deemed in custody when a sufficient additional restraint is imposed arguably has fewer rights than a free individual. For example, if all prisoners are shackled when transported, the restraint would not be additional to the normal prison environment. If the shackled prisoner is then detained during transportation and interrogated, the prisoner is not in custody for *Miranda* purposes, notwithstanding the high likelihood that a reasonable person would find that prisoner to be in custody.

when faced with similar facts.⁸⁵ Thus, a disputed question arose among the state and federal courts: When is a prisoner in custody for *Miranda* purposes?

The Ninth Circuit addressed the application of *Miranda* to the interrogation of a prisoner by a known government official in 1978, in its opinion in *Cervantes v. Walker*.⁸⁶ In *Cervantes*, the prisoner had been incarcerated in a county jail. After directing the prisoner to the prison library for questioning regarding involvement in a recent fight, a deputy had searched the belongings that the prisoner had placed on a table outside the library's door.⁸⁷ On finding a matchbox containing a suspicious substance, the deputy had entered the library and asked the prisoner to identify the substance.⁸⁸ The Ninth Circuit concluded that the deputy's questioning was a spontaneous reaction at the crime scene.⁸⁹ Thus, the questioning did not result in a pressure to detain sufficient to have caused a reasonable person to believe his freedom had been further diminished.⁹⁰

The court in *Cervantes* distinguished *Mathis* on the ground that there the prisoner had been questioned by a government agent who was not a member of the prison staff, regarding a matter not under investigation within the prison itself.⁹¹ The Ninth Circuit held that incarceration does not ipso facto render an interrogation custodial; rather, an individual is only in custody for *Miranda* purposes if, under the totality of the circumstances, a "reasonable person would believe there had been a restriction of his freedom over and above that in his normal prisoner setting."⁹² The Ninth Circuit held that four factors should be considered: the language used to summon the prisoner, the physical surroundings of the interrogation, the extent to which the prisoner is confronted with evidence of his guilt, and the additional pressure exerted to detain the prisoner.⁹³

Cervantes is the seminal case regarding determination of custody in prison and represents the majority view among the U.S. courts of appeals.⁹⁴ Acceptance is not

⁸⁵Compare *United States v. Conley*, 779 F.2d 970, 973-74 (4th Cir. 1985) (finding no custody when prisoner wore handcuffs and full restraints because inmates were commonly transported in that manner) with *State v. Conley*, 574 N.W.2d 569, 572 (N.D. 1998) (finding custody when prisoner wore handcuffs during interview per prison policy).

⁸⁶589 F.2d 424, 427 (9th Cir. 1978).

⁸⁷*See id.* at 426.

⁸⁸*See id.* at 427.

⁸⁹*See id.* at 429.

⁹⁰*See id.* *See also Miranda*, 384 U.S. at 477 (stating that general on-the-scene questioning of unrestrained persons is not affected by *Miranda* holding).

⁹¹*See Cervantes*, 589 F.2d at 428.

⁹²*Id.*

⁹³*See id.*

⁹⁴*See Magid, supra* note 55, at 936-937 (noting that eight of the twelve circuits and at least seventeen states have declined to find for *Miranda* purposes custody for prisoners). Opinions embracing the *Cervantes* standard include, *e.g.*, *United States v. Scalf*, 725 F.2d 1272, 1275 (10th Cir. 1984); *Flittie v. Solem*, 775 F.2d 933, 944 (8th Cir. 1985) (en banc); *United States v. Conley*, 779 F.2d 970, 973 (4th Cir. 1985); *United States v. Willoughby*, 860 F.2d 15, 23-24 (2nd Cir. 1988); *United States v. Menzer*, 29 F.3d 1223, 1231-32 (7th Cir. 1994); *Garcia v.*

universal, however; several courts, judges, and commentators have argued that custody should be evaluated differently.⁹⁵

IV. ANALYSIS

A. Juveniles in Jail Should Be Presumed in "Custody" for Purposes of *Miranda*

The Supreme Court of Colorado erroneously analyzed the totality of the circumstances in its application of the additional-restraint factors to *J.D.* The holding in *J.D.* is problematic not only as applied in that case, but because it presents a risk of repetition in other cases.

The meaning of custody for prisoners should be interpreted broadly.⁹⁶ A fortiori, juvenile prisoners questioned by state actors should be presumed in custody for purposes of *Miranda* unless exigent circumstances are present. Juveniles are less apt than adults to be aware of their rights and to understand the criminal justice setting.

Singletary, 13 F.3d 1487, 1492 (11th Cir. 1994); *State v. Tibiatowski*, 590 N.W.2d 305 (Minn. 1999); *Leviston v. Black*, 843 F.2d 302 (8th Cir. 1988).

⁹⁵The dissent in *Cervantes*, and several other courts and judges maintain that a prisoner is in custody for *Miranda* purposes. See, e.g., *Cervantes*, 589 F.2d at 429 (Anderson, J., dissenting) (arguing that the *Cervantes* test is unrealistic and unworkable); *Young v. State*, 234 So. 2d 341, 345 (Fla. 1970) (stating, prisoner was "without question 'in custody,' as defined in *Mathis*...."); *Wade v. Mancusi*, 358 F. Supp. 103, 104 (W.D.N.Y. 1973); *United States v. Cadmus*, 614 F. Supp. 367, 372 (S.D.N.Y. 1985) (holding that prisoner is *per se* in custody for *Miranda* purposes); *United States v. Morales*, 834 F.2d 35, 40 (2nd Cir. 1987) (Oakes, J., concurring) (arguing that *Miranda* supports a rule that prisoners are *per se* in custody); *People v. Alls*, 629 N.E.2d 1018, 1027 (N.Y. 1993) (Kaye, C.J., dissenting in part) (proposing that prisoners are in custody absent exigent circumstances); *State v. Holt*, No. 725 N.E.2d 1555 (Ohio Ct. App. 1997) (holding that *Miranda* applies to any person in custody).

Other courts have applied the *Cervantes* factors broadly and found custody. See, e.g., *State v. Deases*, 518 N.W.2d 784, 789 (Iowa 1994) (finding additional restraint when prisoner was interrogated in different cell while wearing handcuffs); *State v. Conley*, 574 N.W.2d 569, 572 (N.D. 1998) (finding custody when prisoner wore handcuffs per prison policy during an interview in a prison office); *United States v. Chamberlain*, 163 F.3d 499, 501 (8th Cir. 1999), *reh'g denied* (finding custody when prisoner was questioned in a prison office but was not handcuffed).

Commentators arguing against the *Cervantes* standard include: Magid, *supra* note 55, at 933 n.170; David C. Berg, Note, *Criminal Procedure: Putting the Fifth Amendment Behind Bars*, 55 BROOK. L. REV. 455 (1989) (arguing for *per se* rule); Steve Finizio, Note, *Prison Cells, Leg Restraints, and 'Custodial Interrogation': Miranda's Role in Crimes That Occur in Prison*, 59 U. CHI. L. REV. 719, 730 (1992); Cecilia Jaisle, Note, *Miranda Means What It Says: Protection Against Self-Incrimination for the Juvenile Custodial Interrogee*, 26 WM. MITCHELL L. REV. 267, 288 (2000).

⁹⁶According to Professor Magid:

Upon being summoned and questioned, an inmate will generally feel sufficiently pressured such that it is reasonable for courts to conclude that he is in custody at that point and to require the usual *Miranda* warnings for all custodial interrogations. Requiring the warnings before interrogation in prison strikes a proper balance between individual rights and law enforcement needs. *There should be opportunities to obtain statements from inmates, but only once the inmates know and understand all of their rights....*

Magid, *supra* note 55, at 933 n.170 (emphasis added).

1. How This Presumption Should Work

A presumption that juvenile prisoners are in custody would require that interrogators provide juvenile prisoners with *Miranda* warnings; however, this presumption would not require *Miranda* warnings prior to every conversation between a state actor and a juvenile prisoner. The *Miranda* protections would be triggered only when there is both custody and interrogation. Accordingly, conversations or other interactions that do not rise to the level of interrogation would not trigger *Miranda*. An exception should be allowed when exigent circumstances are present.⁹⁷

2. Justification for This Presumption

a. The Special Nature of Juvenile Suspects Warrants Greater Protection

In cases involving juveniles, the public policy argument for a broader reading of *Miranda* and *Mathis* is even stronger than that for adults. The U.S. Supreme Court has “emphasized that admissions and confessions of juveniles require special caution.”⁹⁸ Juveniles are generally less knowledgeable than adults regarding their rights within the criminal justice system. The Court has stated that a child is an “easy victim of the law” such that special care must be used.⁹⁹

A recurrent question has been the ability of juveniles to comprehend; that is, to understand the nature of a questioning session, a custodial interrogation, or the meaning of the *Miranda* warnings.¹⁰⁰ Many states, by statute or judicial authority, specifically provide added protection to juveniles in the interrogation context.¹⁰¹

⁹⁷See *supra* note 53 (discussing exceptions created by the U.S. Supreme Court). Chief Judge Kaye, Court of Appeals of New York, has proposed:

When there is no prison-related need to avoid *Miranda*... an interrogation should be preceded by advice that the suspect may decline to answer—the setting is already coercive enough to trigger *Miranda*, without additional restraints or coercion. By the same token, in certain exigent circumstances it may be necessary to place added restraints on a prisoner and receive immediate answers. In these cases, fair application of the added restraint test should result in suppression.

Alls, 629 N.E.2d at 1027 (Kaye, C.J., dissenting in part).

⁹⁸*In re Gault*, 387 U.S. 1, 45 (1967). See also *Fare v. Michael C.*, 442 U.S. 707, 732 (1979) (Powell, J., dissenting) (citations omitted) (“This Court repeatedly has recognized that ‘the greatest care’ must be taken to assure that an alleged confession of a juvenile was voluntary.”).

⁹⁹*Haley v. Ohio*, 332 U.S. 596, 599 (1948) (stating that when “a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used”).

¹⁰⁰See *id.* at 601. See also Editorial, *Protecting Kids, Promoting Justice*, CHI. TRIB., Jan. 30, 2000, at 20 (discussing “the appalling practice of allowing kids to waive their *Miranda* rights with no adult to guide them” and “overwhelming evidence that juveniles under the age of fifteen (and in some cases older) do not have the cognitive ability to knowingly waive their constitutional rights”).

¹⁰¹See, e.g., *Matter of Aaron D.*, 290 N.Y.S. 2d 935 (1968); *Lewis v. State*, 288 N.E. 2d 138 (Ind. 1972); *In re K.W.B.*, 500 S.W.2d 275, 281-82 (Mo. App. 1973); *Commonwealth v. Smith*, 372 A.2d 797 (Pa. 1977); *People ex rel. Dino*, 359 So. 2d 586, 591-93 (La. 1978); *J.E.S. v. State*, 366 So. 2d 538 (Fla. Dist. Ct. App. 1979); *State v. Presha*, No. A79-98, 2000 LEXIS 354, at *10 (N.J. 2000). See also ALA. R. JUV. P. 11(B) (stating that, juvenile in

Some of these jurisdictions require the presence of a parent or an attorney at all custodial interrogations of juveniles.¹⁰² For example, the Kansas Supreme Court recently concluded that the totality-of-the-circumstances analysis is not sufficient to ensure that a child under the age of fourteen has made an intelligent and knowing waiver of his rights in a custodial interrogation.¹⁰³ In that case, the court stated, “The heavy burden of proving a knowing waiver by a juvenile is on the State.”¹⁰⁴ The court then held that a per se exclusionary rule applies to statements made by a juvenile under fourteen years old unless the juvenile consulted with his or her parent, guardian, or attorney regarding waiver of his or her *Miranda* rights.

The interrogation of a juvenile prisoner is susceptible to coercion and thus raises due process concerns. It may not be a technique for obtaining confessions that is “compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant’s will was in fact overborne.”¹⁰⁵ The minimal cost of requiring the *Miranda* warnings for interrogations of incarcerated juveniles is justified by the importance of the individual rights involved.¹⁰⁶ Courts should require the provision of *Miranda* warnings to all incarcerated juvenile interrogees. Unless exigent circumstances are present¹⁰⁷, or the juvenile makes a knowing and intelligent waiver of his or her rights, any statements made by the juvenile should be excluded.¹⁰⁸

b. Existing Safeguards Are Inadequate

i. Judicial Application of Totality-of-the-Circumstances Analysis: Where *J.D. Went Wrong*

Depending on a court’s application, the totality-of-the-circumstances analysis can be more protective or less protective of the constitutional rights of a juvenile

custody must be informed of the right and the means to communicate with counsel, parent, or guardian, if not present).

¹⁰²See Robert McGuire, Note, *A Proposal to Strengthen Juvenile Miranda Rights: Requiring Parental Presence in Custodial Negotiations*, 53 VAND. L. REV. 1355, 1378-80 (2000) (discussing states that deem juvenile confessions involuntary when made in absence of parent or guardian).

¹⁰³See *In re In the Matter of B.M.B.*, 955 P.2d 1302, 1312 (Kan. 1998).

¹⁰⁴*Id.* at 1309.

¹⁰⁵See *Perkins*, 496 U.S. at 301 (Brennan, J., concurring).

¹⁰⁶As an editorialist for the CHICAGO TRIBUNE wrote:

The logistics of providing a juvenile with counsel [during interrogation] can hardly be overwhelmingly burdensome given the number of states that have adopted similar [laws]....[W]e are bound to choose constitutional rights over logistical inconvenience. Editorial, *supra* note 100, at 20.

¹⁰⁷This Note does not address directly whether the *Perkins* undercover agent exception should apply to juveniles.

¹⁰⁸This Note does not address directly the inquiry into the voluntariness of a waiver of constitutional rights. See, e.g., Elizabeth Maykut, *Who is Advising Our Children: Custodial Interrogation of Juveniles in Florida*, 21 FLA. ST. U. L. REV. 1345, 1371 (1994); McGuire, *supra* note 102, at 1359.

prisoner. The *J.D.* majority listed fourteen factors that could be considered in the totality-of-the-circumstances analysis.¹⁰⁹ An application of the fourteen factors to the situation in *J.D.* should indicate strongly that the interrogation of *J.D.* was custodial. To illustrate this point, the following section discusses each of the factors and the relevant facts from *J.D.*

The language used to summon the prisoner. The majority opinion stated that *J.D.* had not been summoned; rather, she had initiated the conversation. Certainly, *J.D.* and Kuretich had previous contacts, including phone calls initiated by each of them, respectively. When the scheduled time for the telephone conference call arrived, it is likely, though not described in the record, that a detention officer escorted *J.D.* to the office where the call was to occur. The trial court found that “the language used to summon the person [was] not indicative of anything one way or the other here.”¹¹⁰ When an officer summons a prisoner there is an implicit command to submit to the officer’s will. Even if *J.D.* expected the meeting to occur, that does not mitigate the fact that *J.D.* was summoned by an officer and escorted to a separate room in the jail.

The physical surroundings of the interrogation. Oddly, the majority stated that during the interrogation *J.D.* was not segregated from the general population at the facility.¹¹¹ In contrast, the dissent stated that the trial court found that the discussion had occurred in a room separate from the general population.¹¹² Separation from the general population has been a distinguishing fact in other cases.¹¹³ Even when in a room with an unlocked door, a prisoner by definition is not able to move without the consent of the authorities.¹¹⁴

The extent to which the prisoner is confronted with evidence of his or her guilt. Both the majority and dissenting opinions concluded that *J.D.* had been confronted with incriminating evidence. Kuretich told *J.D.* that she was a suspect in a robbery and that other charges were pending against her. Kuretich asserted that *J.D.* was a lookout and she saw the entire crime.¹¹⁵ Kuretich explained to *J.D.* that he could work out a deal with the district attorney regarding *J.D.*’s involvement in the robbery if *J.D.* provided helpful information.¹¹⁶ Kuretich also claimed that others might implicate *J.D.*

¹⁰⁹See *supra* section I(C)(1) listing the factors.

¹¹⁰Transcript of Proceedings, at 8, *People ex. rel. J.D.* (Colo. Dist. Ct. Mar. 19, 1999) [hereinafter Transcript].

¹¹¹See *J.D.*, 989 P.2d at 772.

¹¹²See *id.* at 776. See also Transcript, *supra* note 110, at 6. The prosecutor informed the author that *J.D.* and the Nevada officers participated in the conference call from an office in the detention center. Schulte interview, *supra* note 38.

¹¹³See, e.g., *Conley*, 574 N.W.2d at 571-72, 575 (finding custody when interview occurred in prison office); *Chamberlain*, 163 F.3d at 501 (finding custody when interview occurred in prison office).

¹¹⁴*J.D.* “was not at full liberty to leave.” Transcript, *supra* note 110, at 6. See *Chamberlain*, 163 F.3d at 504 (stating that prisoner would have violated prison rules by leaving the interview room without permission).

¹¹⁵See *J.D.*, 989 P.2d at 776.

¹¹⁶See *id.* at 773-74.

The additional pressure exerted to detain the prisoner. The majority opinion found that no additional pressure was exerted to detain J.D.; however, the facts necessitate the opposite conclusion. The interrogators exerted additional pressure on J.D. to provide incriminating information by threatening her with full criminal charges, including the possibility of being charged as an adult. The trial court had found “both coaxing and some implied threats” that if J.D. did not cooperate, information would be sought from others, and the state would proceed with full charges against her.¹¹⁷ For example, the dissent wrote, Kuretich told J.D. that once he brought other suspects in,

... I may offer them the same kind of deal. Let me know about the robbery and who was involved and in turn I’m gonna give you this kind of deal. Which means that they may be not going to jail but they may finger you, and then, you’re gonna have to go to jail.¹¹⁸

As the excerpt above indicates, Kuretich pressured J.D. to provide more information or face a harsher penalty.

Time, place and purpose of the encounter. The questioning occurred during the day, in a room separate from the general detention population.¹¹⁹ As the trial court found, the questioning’s purpose was to gain information regarding a robbery, including the potentially criminal acts of J.D.¹²⁰

Persons present in the room during the interrogation. J.D., a probation officer, and a detention officer, were the only people in the room; two Fort Morgan detectives were connected via speakerphone. The majority stated that J.D. had arranged for the two officers to be present based on Kuretich’s direction to get someone she trusted.¹²¹ The dissent, however, argued that the record did not support the majority opinion’s conclusion that J.D. trusted or arranged the presence of the officers.¹²² The dissent concluded that the record supported the trial court’s opposite conclusion. The dissent stated that “J.D.’s language betrayed her uneasiness with the whole interrogation. In fact, Kuretich had to point out that she needed to start trusting someone.”¹²³

¹¹⁷See Transcript, *supra* note 110, at 5. According to the majority opinion, J.D. did not indicate any unwillingness to talk about her role in the robbery. See *J.D.*, 989 P.2d at 772. In contrast, the dissent noted that the “promises and threats [by Hagen and Kuretich] increased when she appeared reluctant to give a statement.” *Id.* at 776 (Martinez, J., dissenting).

¹¹⁸See *J.D.*, 989 P.2d at 774 (Martinez, J., dissenting).

¹¹⁹See Transcript, *supra* note 110, at 3 and 6.

¹²⁰See *id.* at 3.

¹²¹See *J.D.*, 989 P.2d at 771.

¹²²The dissent maintained:

Nowhere does the record even suggest that J.D. trusted Hagen or Foster, only that Kuretich instructed her to get someone she trusted. Nevertheless, the majority assumes that J.D. was able to carry out these instructions, make the arrangements for a private room with a speakerphone, and find people she trusted while in detention.

Id. at 776-77 (Martinez, J., dissenting).

¹²³*Id.* at 777 (Martinez, J., dissenting).

The fact that *J.D.* involved the use of a telephone conference call rather than solely a face-to-face interaction does not minimize the coercive possibilities. Further, it is possible that the combination of the physical presence of two officers and the telephone presence of two detectives, is more inherently coercive than a traditional face-to-face interrogation. The holding in *J.D.* creates a telephone loophole that allows for coercive conduct. Hypothetically, under this loophole, detectives could dispense with *Miranda* simply by arranging a conference call, even if the defendant and the detectives were only separated by a wall.

Words spoken by officer to defendant, officer's response to any questions asked by defendant, and officer's tone of voice and general demeanor. These three factors overlap and illustrate that Kuretich, J.D., and the probation officer interacted as if it were a typical stationhouse interrogation. Kuretich used conventional police bargaining methods. He told J.D. that a deal might be worked out based on the information she would provide.¹²⁴ He also told her that some people had talked already and others would be interrogated.¹²⁵

A typical negotiation technique is to use one officer as a friendly and trustworthy figure. The friendly officer helps convince the suspect of the reasonableness of the other officer's point. The suspect is more likely to agree with the friendly officer than to challenge both officers. This technique, whether intended or not, occurred in *J.D.* As this excerpt demonstrates, the probation officer supported Kuretich's statements:

Kuretich: '[P]art of the deal that we've worked out is if any charges were filed, we wouldn't charge her as an adult, but probably as a juvenile, which would make a big difference on how much time you serve in jail, if any at all.'

Hagen: 'What it sounds like to me here, is with your cooperation they won't go after you with full charges. If you don't cooperate with them they might go after you with all the charges.'¹²⁶

In the exchange above, Hagen seconded Kuretich's statement, and so played a role in eliciting statements from J.D. The trial court thus properly found that Hagen, the probation officer, actively encouraged J.D.¹²⁷

Defendant's verbal or nonverbal response. Often J.D.'s responses were, as reprinted in the dissent, "inaudible."¹²⁸ This suggests either that she was too far from the telephone or that she was reluctant or uneasy about speaking to the officers. Under the former interpretation, J.D. would have been too far from the telephone to exercise control over it. Under the latter interpretation, contrary to the majority's

¹²⁴See Transcript, *supra* note 110, at 5 ("There was both coaxing and some implied threats that if she was not willing to cooperate than they would seek information from others and then would proceed with full [sic] panoply of charges against her.").

¹²⁵See *J.D.*, 989 P.2d at 774 (quoting unpublished transcript of conference call attended by J.D., Detectives Kuretich and Gardner, and Officers Hagen and Foster).

¹²⁶*Id.*

¹²⁷See Transcript, *supra* note 110, at 5.

¹²⁸*J.D.*, 989 P.2d at 774.

conclusion, J.D. would not have been in control of the interrogation.¹²⁹ The trial court explicitly found that J.D. did not have control over the telephone.¹³⁰

Any limitation of movement or other form of restraint placed on defendant during interrogation. Courts have placed different weight on whether a prisoner was physically restrained.¹³¹ J.D. was not handcuffed, though the meeting did occur in a room separate from the general population. Since there was a conference call, it may be presumed that the door was closed. The trial court found that J.D. could not physically disengage herself completely from the conversation.¹³²

Length and mood of the interrogation. The interrogation lasted forty minutes. It is difficult to ascertain the mood from the court's transcript excerpts. The majority concluded that there was no evidence to indicate that J.D. was unable to terminate the telephone conversation.¹³³ But the conversation began and ended with Kurelich speaking with the probation officer. This could indicate that one or both of them controlled the length of the call.¹³⁴ According to the dissent, "The trial court found that J.D. did not have control over the telephone and could not hang up at any time to end the interrogation."¹³⁵

Whether directions were given to defendant during interrogation. From the excerpts in the opinion, no explicit directions appear to have been provided.

Presence of parents or whether parents had knowledge of the interrogation. No parent was present, but J.D.'s mother knew of the interrogation. Kurelich testified that the mother did not object to the telephone interrogation.¹³⁶ Although Kurelich provided *Miranda* warnings to the mother, he did not give the warnings to J.D.¹³⁷ Had the court held that the interrogation was indeed custodial, the presence of a

¹²⁹*See id.* at 769.

¹³⁰*See* Transcript, *supra* note 110, at 6.

¹³¹*Compare* United States v. Conley, 779 F.2d 970, 973-74 (4th Cir. 1985) (finding no custody when prisoner wore handcuffs and full restraints because inmates were commonly transported in that manner) *with* North Dakota v. Conley, 574 N.W.2d 569, 572 (N.D. 1998) (finding custody when prisoner wore handcuffs during interview per prison policy) *and* Chamberlain, 163 F.3d at 504 (finding custody when door was closed but unlocked and prisoner was not restrained during interview).

¹³²*See* Transcript, *supra* note 110, at 6.

¹³³*See J.D.*, 989 P.2d at 772.

¹³⁴*See id.* at 776.

¹³⁵*Id.* (Martinez, J., dissenting).

¹³⁶*See id.* at 771.

¹³⁷The court stated that Kurelich gave J.D.'s mother a written *Miranda* warning. *See id.* However, the prosecutor informed the author that Kurelich provided a *Miranda* warning over the telephone. Schulte interview, *supra* note 38. Since the court held that there was no custodial interrogation, the *Miranda* warning to the mother was not required. The facts surrounding the telephone call to the mother were not litigated. Still, it should be noted that in its discussion of the totality of the circumstances, the court mentioned the reading of the *Miranda* warning to the mother. *See J.D.*, 989 P.2d at 771.

parent would have been statutorily required and J.D.'s statements would have been inadmissible even if J.D. had been given *Miranda* warnings.¹³⁸

It can be questionable whether the parent understands the legal ramifications of the warnings, and it is also possible that the parent or guardian is not necessarily acting in the best interest of the child.¹³⁹ For example, J.D. was a runaway and had a troubled relationship with her mother; this is exactly the type of situation in which adverse interests might be involved.¹⁴⁰ Given these facts, it is questionable whether J.D.'s mother could make a decision about the interrogation that fully considered J.D.'s best interest.

Nevertheless, the presence of a parent or custodian can help monitor and limit the police's use of coercive techniques. J.D. was separated from her family and legal counsel; surely she was susceptible to psychological manipulation and subtle coercion by the government officers. Four-on-one bargaining is difficult for anyone; against a juvenile facing additional prison time, it is almost certainly coercive. In *Miranda*, the Court's prescribed procedural safeguards were directly intended to protect against psychological and not just physical coercion.¹⁴¹

The preceding discussion of the fourteen factors is not meant to be definitive; rather, it is intended to show that reasonable minds can, and do, differ over interpretations of fact-specific totality-of-the-circumstances analyses. In *J.D.*, a majority of the Supreme Court of Colorado applied the same law as the dissent and the trial court, but reached a completely different result.¹⁴² Courts frequently use a totality-of-the-circumstances analysis to deal with a wide range of legal issues. The weakness of the totality-of-the-circumstances analysis for determining the custody of prisoners is that different judges and courts often interpret the same or similar facts

¹³⁸See 6 COLO. REV. STAT. § 19-2-511(1) (1999), discussed *supra* note 26 and accompanying text.

¹³⁹See Trey Meyer, Comment, *Testing the Validity of Confessions and Waivers of the Self-Incrimination Privilege in the Juvenile Courts*, 47 U. KAN. L. REV. 1035, 1064 (1999) (noting possibility that meaningful consultation with an interested adult may not occur notwithstanding presence of parent, guardian, or attorney); Evan Osnos & Julie Deardorff, *Ten-Year-Old's Slaying 'Confession' Barred*, CHI. TRIB., July 20, 1999, at 1 (quoting Stephen Ceci, Professor of Developmental Psychology at Cornell University, stating that a parent alone is not the best person to be present during a police interview, rather it should be someone who is knowledgeable about the law).

¹⁴⁰The prosecutor informed the author that J.D. had a prior conviction for the theft of her mother's car. Also, J.D. was possibly in the custody of the Department of Social Services at the time of the interrogation. Schulte interview, *supra* note 38.

¹⁴¹The Court stated in *Miranda*:

Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented. As we have stated before ... this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition. Interrogation still takes place in privacy.

Miranda, 384 U.S. at 448.

¹⁴²See *J.D.*, 989 P.2d at 777 (Martinez, J., dissenting) (citations omitted) ("While the majority 'does not question the trial court's decision to apply the totality of the circumstances standard' or its 'factual findings, none of which are in material dispute,' they nonetheless apply the same standard to those findings and reach a different conclusion.").

and circumstances differently.¹⁴³ In expanding the analysis to include fourteen factors, the court in *J.D.* made the custodial interrogation question more indeterminate.

Since coercion can easily occur off the record or through subtle psychological methods, a fact-based totality-of-the-circumstances analysis is not appropriate. In *Miranda*, the U.S. Supreme Court stated that the secrecy of interrogations keeps a court from knowing actually what occurs in the interrogation rooms.¹⁴⁴ In *Perkins*, the case involving questioning by an undercover agent in prison, the U.S. Supreme Court provided insight into the extent of *Miranda* protections in the prison setting.¹⁴⁵ This insight is helpful to understand why *J.D.* was decided erroneously. The Court made several statements about facts that were lacking in the situation in *Perkins* that might otherwise have rendered the prison interrogation custodial. The Court's concern in *Miranda*, reiterated in *Perkins*, was that a police-dominated atmosphere would generate "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely."¹⁴⁶

Several facts indicate that the coercion absent in *Perkins* was present in *J.D.* Once J.D. was in the small room with two officers and connected by speakerphone to two detectives, and the questioning focused on her, the atmosphere was police-dominated.

In *Perkins*, the Court stated, "It is the premise of *Miranda* that the danger of coercion results from the interaction of custody and official interrogation."¹⁴⁷ The Court's use of the word "official" should not be seen as inadvertent. Rather, it should be interpreted as an attempt to distinguish interrogations conducted by an apparent friend (*i.e.* undercover agents) from interrogations conducted by officials acting under color of law (*i.e.* known officers). While the defendant in *Perkins* believed he was speaking freely to a fellow prisoner about past exploits, J.D. knew she was speaking with four government officers about her alleged involvement in an armed robbery and that criminal charges might be brought against her. In *J.D.*, the officers were openly acting under color of law; thus the interrogation was official.

In *Perkins*, the Court stated that there are potential pressures present in questioning by captors who appear to the suspect to control the suspect's fate.¹⁴⁸ These pressures were absent in *Perkins*, but present in *J.D.* The defendant in *Perkins*

¹⁴³See *supra* note 131.

¹⁴⁴See *Miranda*, 384 U.S. at 448 ("Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms.").

¹⁴⁵See *supra* § II(B)(1) (discussing *Perkins*).

¹⁴⁶*Perkins*, 496 U.S. at 296 (quoting *Miranda*, 384 U.S. at 467). See also *Miranda*, 384 U.S. at 445 (stating that *Miranda* warning was intended to preserve privilege against self-incrimination during "incommunicado interrogation of individuals in a police-dominated atmosphere").

¹⁴⁷See *Perkins*, 496 U.S. at 297 (emphasis added).

¹⁴⁸See *id.* ("Questioning by captors, who appear to control the suspect's fate, may create mutually reinforcing pressures that the Court has assumed will weaken the suspect's will....").

did not believe that the questioner had any control over his fate.¹⁴⁹ In contrast, J.D. was well aware that Detective Kuretich could work with the prosecutor in determining charges, and thus could exercise official power over her and affect her future treatment. Additionally, since J.D. was a prisoner, the juvenile detention officer was capable of exercising official power over her.¹⁵⁰

In *J.D.*, the respective totality-of-the-circumstances analyses by the majority and dissent differed sharply. Their differing applications of the law to the facts indicate the weakness of the totality-of-the-circumstances analysis. Moreover, as the foregoing discussion of the facts in *J.D.* shows, the totality-of-the-circumstances analysis should have resulted in a finding of custody for *Miranda* purposes. The majority's contrary finding is problematic. A bright-line rule that juvenile prisoners are in custody for *Miranda* purposes would solve this problem.

ii. Failure of Statutory Safeguards

The *J.D.* majority's narrow interpretation of the meaning of custody defeated the purpose of the Colorado statute and precluded its protections. Since the court held that there was no custodial interrogation, the statute did not apply. Drawing on the policy behind the statute, the court could have chosen to apply a broader interpretation of custody for juveniles. Such an interpretation would not have overruled *Denison* (the Colorado precedent for *J.D.*) because *Denison* involved an adult.

The record indicates that Detective Kuretich provided *Miranda* warnings to J.D.'s mother, yet he never mentioned those same warnings to J.D. The fact that Kuretich believed there was any reason at all to provide the warnings to the mother before questioning J.D. indicates that he had some sense that *Miranda* concerns might be implicated, if not required. His omission of the *Miranda* warnings to J.D. points out the shortcoming of the statute when custodial interrogation is interpreted narrowly. If the court had concluded that there was a custodial interrogation, then the mother (or another guardian or custodian) should have been present and the *Miranda* warnings should have been given. Instead, under the court's narrow interpretation of custody, Kuretich was able to omit the *Miranda* warnings. Absent exigent circumstances, the time and effort required to provide *Miranda* warnings are minimal.¹⁵¹ Kuretich could have easily prefaced the questioning with the *Miranda* warnings.

¹⁴⁹*Id.* at 297-98 ("When the suspect has no reason to think that the listeners have official power over him, it should not be assumed that his words are motivated by the reaction he expects from his listeners. ... [Perkins] viewed the cellmate-agent as an equal and showed no hint of being intimidated by the atmosphere of the jail.").

¹⁵⁰"[O]ne of the people having control over her behavior within that facility was [Detention Officer] June Foster." Transcript, *supra* note 110, at 6. *Accord Perkins*, 496 U.S. at 303 (Brennan, J., concurring) (stating that the state is in a unique position to exploit a prisoner's vulnerability because the state has virtually complete control over the prisoner's environment).

¹⁵¹In a law review note, a student has stated: "The privilege against self-incrimination is so vital to the individual, and the ease in reciting these rights so simple, that there is no reason for failing to give *Miranda* warnings to a juvenile custodial interrogee." Jaisle, *supra* note 95, at 288.

3. Uncertainty in the Courts

The totality-of-the-circumstances analysis is too uncertain when *Miranda*'s protections are involved.¹⁵² A rule of per se custody for juvenile prisoners subject to certain exceptions would provide government officers, courts, and individuals with the clear guidelines and protections intended by the Court in *Miranda*. The prison setting is surely receptive to police coercion, yet the application of the additional-restraint factors tends to result in a decision that the prisoner was not in custody for *Miranda* purposes.¹⁵³ While confessions and bargaining are an important part of law enforcement, the playing field should be fair.¹⁵⁴

The goal of the U.S. Supreme Court in *Miranda* was to avoid fact-based voluntariness inquiries and rely on a per se rule that errs on the side of protection rather than coercion.¹⁵⁵ The lower courts, however, have not applied *Miranda* accordingly.¹⁵⁶ Not only have the courts analyzed custodial interrogations under the more exacting additional-restraint factors, but they have reached different results on similar facts.¹⁵⁷

¹⁵²See *Cadmus*, 614 F. Supp. at 372 (stating that *Cervantes* standard is elusive).

¹⁵³See *Morales*, 834 F.2d at 39 (Oakes, J., concurring) (“[C]ourts applying these factors invariably conclude that the challenged interrogations are noncustodial, suggesting that the factors may merely disguise a denial of prisoners’ Fifth Amendment rights.”). See also *Cadmus*, 614 F. Supp. at 372 (finding prison setting to be inherently coercive).

¹⁵⁴The U.S. Supreme Court has stated:
[A]dmissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to this suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant’s will was in fact overborne.
Miller v. Fenton, 474 U.S. 104, 116 (1985).

¹⁵⁵The U.S. Supreme Court has stated recently:
In *Miranda*, the Court noted that reliance on the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial confession, a risk that the Court found unacceptably great.... The Court therefore concluded that something more than the totality test was necessary.
Dickerson v. United States, 120 S. Ct. 2326, 2335 (2000).

¹⁵⁶See *Cadmus*, 614 F. Supp. at 372 (“Application of the principles enunciated in *Cervantes*... would reintroduce, in the prison setting, the case-by-case analysis of coerciveness that *Miranda* was intended to avoid.”). As Professor Magid has noted:

Thus far, the additional-restraint test has been used to find that many inmates are not in custody at the moment they are questioned in prison and can be questioned with no warnings at all. The test would be better used to find that... once approached, an inmate very likely returns to a custodial state and is entitled to be warned or otherwise protected before any questioning.

Magid, *supra* note 55, at 951.

¹⁵⁷Compare *Chamberlain*, 163 F.3d at 504 (finding custody when prisoner was questioned in prison office but was not handcuffed) with *Conley*, 779 F.2d at 973-74 (finding no custody when prisoner in handcuffs and full restraints was questioned in conference area awaiting medical treatment) and *Cervantes*, 589 F.2d at 426-27 (finding no custody when prisoner was escorted to six-by-four-foot jail library and questioned by two officers about stabbing incident and suspicious substance found in mailbox). See also *supra* note 85.

The additional-restraint factors place too high of a burden on the defendant to satisfy the custody prong of the custodial interrogation analysis. The difficulty of demonstrating custody under the additional-restraint factors allows unwarned questioning to occur unless the officers overtly overreach. The unlikelihood that a court will find custody under the additional-restraint factors could encourage officers to question prisoners cleverly and to avoid providing *Miranda* warnings.

In *Miranda*, the Court stated a bright-line rule, one that provides a clear standard for individuals, law enforcement officers, and the courts. In *Mathis*, the Court extended the bright-line rule to prison interrogations. In *Dickerson*, the Court reaffirmed its commitment to *Miranda*'s bright-line rule. The subjective uncertainty that the totality-of-the-circumstances analysis and the additional-restraint factors will provide adequate protection to juveniles, demands a bright-line rule.¹⁵⁸

Some courts have stated a concern that a rule of per se custody would provide more protection to prisoners than free individuals. Under the application of the additional-restraint factors, prisoners receive substantially less protection than free individuals. The only reason J.D. was not legally entitled to receive *Miranda* warnings was because of her incarceration; such a tortured result is unnecessary.

IV. CONCLUSION

Courts should construe the meaning of custody for juvenile prisoners broadly. Juvenile prisoners should receive *Miranda* warnings prior to interrogation by a state official unless the situation involves exigent circumstances.

¹⁵⁸ As one court stated:

A rule requiring that *Miranda* warnings be administered any time an individual in custody is questioned about criminal activity ... protects both law enforcement objectives and the Fifth Amendment, and will avoid problems, not cause more confusion. Neither the police nor the courts will have to speculate as to whether or when *Miranda* warnings must be given to a person in custody.

Holt, 725 N.E.2d at 1159-60.